93-867

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GEORGE J. FOXX,

Petitioner,

V.

H. LAWRENCE GARRETT, III,
Secretary, Department of the Navy,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION

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QUESTION PRESENTED

WHETHER SUMMARY JUDGMENT IS PROPER IN A TITLE VII RACE DISCRIMINATION CASE WITH MATERIAL DISPUTED FACTS BROUGHT BY A FEDERAL CIVIL SERVANT AND WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES PROCEDURAL PROTECTION IN THE REMOVAL FROM SERVICE OF A THIRTEEN-YEAR FEDERAL CIVIL SERVANT

FOXX v. GARRETT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATION DISCLOSURE STATEMENT

The following have an interest in the outcome of this case:

Honorable James C. Cacheris, District Judge

George J. Foxx, Petitioner

H. Lawrence Garrett, III, Respondent

Anthony F. Gonzalez, Esquire, Counsel for Petitioner

Richard Parker, Esquire, Assistant United States Attorney, Counsel for Respondent

Howard J. Shifke, Esquire, Counsel for Petitioner

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OPINION BELOW

On September 1, 1993, the United States Court of Appeals for the Fourth Circuit, in a four-page opinion, affirmed the District Court's order granting summary judgment of Petitioner's race discrimination claims and dismissing Petitioner's due process claims. A copy of the opinion is attached in the appendix hereto, p. A1, infra.

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is made pursuant to 28 U.S.C. §1254(1). Jurisdiction for the appeal was pursuant to 28 U.S.C. §1291, appeal from a final judgment of the district court.

Jurisdiction for the original proceeding was pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5, and the Due Process Clause of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involved race discrimination claims brought under Title VII, the Civil Rights Act of 1963, as amended, 42 U.S.C. §2000e-5 and the Due Process Clause of the United States Constitution. These are reprinted in the appendix hereto, p. A5, ,infra.

STATEMENT OF THE CASE

In February of 1991, Petitioner filed a three-count Complaint. Count I alleged that Petitioner, a Navy civilian personnel, was denied a promotion on the basis of race. Count II alleged that Petitioner's employment with Respondent was terminated on the basis of race. Count III alleged that Petitioner was denied procedural due process in the termination of his employment with Respondent.

On July 28, 1992, Respondent filed a Motion to Dismiss or in the Alternative, for Summary Judgment. Respondent set forth its version of facts to state that Petitioner was terminated from employment based upon fraudulent conduct on the part of the Petitioner.

Respondent's general facts in support of its Motion are as follows:

Plaintiff was employed as a Supervisory Computer Programmer

Analyst, NM-11, at the U.S. Naval Station, Panama Canal Zone. He worked in the Supply and Fiscal Department. His supervisor was Lieutenant Commander (LCDR) K. C. Purdy. On November 13, 1989, Plaintiff sought permission to travel on temporary official duty to Orlando, Florida, to attend an automated data processing (ADP) course. Defendant's Exhibit (DE) 1 (TAD travel request). The course was to be presented by the U. S. Professional Institute (USPI) of Silver Springs, Maryland, and run from December 4-7, 1989. DE 2 (Request Authorization Agreement). Plaintiff's request was approved on November 21, 1989. DE 3 (Request and Authorization for TDY Travel of DOD Personnel). Plaintiff also received authorization to take annual leave in conjunction with the course from December 9-18, 1989. See DE 4 (Proposal to Remove). Plaintiff's son and other relatives and friends resided in and around Florida and he planned to visit them after completing the course. Although the course was canceled on November 27, 1989, Plaintiff left Panama on schedule on December 2, 1989. See DE 5 (Travel Voucher). Plaintiff maintains that he did not receive notification of the cancellation of the course prior to his departure from Panama. Plaintiff returned to Panama on December 17, 1989. Id. On January 3, 1990, he filed his trip voucher in order to be reimbursed for funds expended on the trip. Id. On his voucher Plaintiff claimed to have stayed at the Court of Flags hotel in Orlando on the night of December 3-4, 1989. Id. He filed a 'Lost Receipt' form after telling Ms. Sabina Malver Culmer, a Navy clerk, that he lost his lodging receipt. DE 6 (lost voucher form). He also claimed reimbursement for rental car expenses for one week even though he was only scheduled to be on official duty at the ADP course for 5 days. DE 5. As set forth below, Plaintiff's behavior after his return from TDY raised questions within the Panama Naval community, and eventually led to the discovery of his travel fraud.

Respondent argued that it was entitled to summary judgment on the race discrimination counts because Petitioner was not qualified for his position due to fraudulent behavior and because there were no similarly situated individuals from outside Petitioner's protect-

ed claim who engage in similar conduct but were not terminated from employment.

Petitioner responded in opposition to Respondent's Motion and set forth the following facts:

> In July of 1989, Complainant arrived in Panama after accepting an NM-11 job with Defendant in Panama. Upon Complainant's arrival, Defendant's Supply Department, LCDR K. C. Purdy, approached each Caucasian male in the Customs Clearing Room to ask if he was George Foxx, Complainant. When Complainant, a Black male, announced that he was George Foxx, LCDR K. C. Purdy exclaimed, "Oh sh_t" and gestured further disappointment. (Complainant's Exhibit A). The following day, Caucasian female, Cornelia Ceddy, called Complainant's office to tell Complainant's employees that their new supervisor was Black. Also, in August of 1989, two Caucasian females lodged a false sexual harassment complaint against Complainant. Finally, they acknowledged that the complaint was false and that they were put up to it by higher-ups in an attempt to remove Complainant because he was Black. (Complainant's Exhibit A). Complainant was invited to K. C. Purdy's quarters for Christmas dinner on December 25, 1989; he was told to bring his own chair and presumed a shortage of chairs. Upon entering the quarters with his chair, Complainant realized that there was an abundance of empty matching chairs and that he was the only Black and the only one required to bring his own chair to sit in. K. C. Purdy and his other guests laughed at Complainant as he stood there with his chair. (Complainant's Exhibit A). In December of 1989, Complainant arrived in Orlando, Florida for a Software Configuration Management Seminar. When he went to check in for registration, he learned that the seminar had been canceled. (Complainant's Exhibit B). Complainant's minor child lived in Tampa with relatives because approval for him to come to Panama had yet to go through, so Complainant went to see his son, who was twelve at the time. (Complainant's Exhibit B). Also, Complainant originally had scheduled vacation time subsequent to the seminar so that he could see his son. Complainant never spoke with Carol Wagenheim. Although

Ms. Wagenheim may have telephoned Panama to notify Complainant of the course cancellation, she spoke with somebody other than Complainant. Also, he did not receive the letter supposedly sent by Ms. Wagenheim as confirmation that the course was canceled. (Complainant's Exhibit A). Plaintiff telephoned Panama to inform personnel of the course cancellation and he explained that he would be beginning his vacation. (Complainant's Exhibit B). Upon Complainant's return to Panama, he submitted a travel voucher for expenses incurred that were related to the seminar. (Complainant's Exhibit B). Complainant had lost some receipts and was assisted by Sabina Culmer in filling out his travel voucher. Since his travel voucher related to military approved travel, Ms. Culmer assisted Mr. Foxx in retracing his steps related to the military. There is a discrepancy with the fact that Complainant stayed at the Days Inn in Lakeland, Florida rather than the Court of Flags in Orlando, Florida, but Complainant explained that Ms. Culmer had instructed him to fill in Court of Flags because it was the preauthorized hotel. (Complainant's Exhibit B). The difference in cost was $27.90. Also, Complainant rented a car for use while traveling in Florida for the seminar. Upon learning that the seminar was canceled, Complainant contacted Alamo Rent-A-car to see about returning the car and rates. He was informed that he had had the car long enough that he was going to be charged for the week, so he kept the car for the week. (Complainant's Exhibit B). On May 17, 1990, Defendant provided Complainant with a letter of proposed removal.The letter alleged travel voucher fraud and explained that the removal was proposed for not less than thirty days subsequent to the notice. (Complainant's Exhibit C). Four days later, Complainant was fired from his job in Panama by Defendant. (Complainant's Exhibit D). A similarly situated Caucasian male, Harvey Von Hollen, was convicted of travel voucher fraud and a letter of reprimand was placed in his file for two years. (Complainant's Exhibit E)

Petitioner's response in opposition to Respondent's Motion was supported by sworn affidavits and MSPB testimony as well as other documentation. Respondent filed a reply to Petitioner's

response, and Respondent supported its reply with two undated, unnotarized declarations.

Petitioner filed a Motion to Strike these two declarations, asserting that they were not sworn to not notarized, were not based upon personal knowledge and one of the declarations was by an individual not even listed as a witness for trial. On August 28, 1992, a hearing was held on Respondent's Motion to Dismiss or, in the Alternative, for Summary Judgment. On September 9, 1992, the District Court granted Respondent's Motion in its entirety. The District Court found a number of facts to be in dispute, but it stated that there was no dispute as to Petitioner filing a false travel voucher. The District Court ruled that this was a legitimate, nondiscriminatory reason for no-promotion and termination for employment.

Further, the District Court found that Petitioner did not show pretext. In its footnote to this conclusion, the District Court relies, in part, on the undated, unnotarized declaration of Harvey Von Hollen.

Additionally, the District Court dismissed Count III finding that Petitioner had not raised the claim at the MSPB or EEOC.

Petitioner appealed his case to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the ruling. However, the Fourth Circuit gave different reasons for its ruling that had been given by the District Court.

The Fourth Circuit found that Petitioner's prima facie case failed as to Count I because Petitioner did not show that a position remained available for a promotion to equally qualified people subsequent to Petitioner being rejected.

As to the due process claim, the Fourth Circuit felt that the Civil Service Reform Act provided an adequate remedy for the conduct complained of.

REASONS FOR GRANTING THE WRIT

Petitioner, a Black male, served five years in the Armed Forces followed by thirteen years in the Federal Civil Service. In this case, he was subjected to extreme racial prejudice and removed from the Federal Civil Service just two years prior to reaching his twenty year retirement eligibility.

Not only was his removal racially motivated, but his removal

violated due process and all of the procedural projections accorded a thirteen-year Federal Civil Servant.

The District Court granted summary judgment on the racial issues and a dismissal on the due process claim. The Fourth Circuit issued a "right decision - wrong reason" opinion, the result of which has denied Petitioner a trial on any of his issues.

The documents in the case prove Petitioner's Count III, that he was removed from the Federal Civil Service without due process of law. The District Court said is was procedurally barred, the Fourth Circuit said the Civil Service Reform Act provides an adequate remedy. Petitioner asserts that there was no procedural bar and that this Court should hear Count III under the Due Process Clause of the United States Constitution. Additionally, summary judgment was improper on a Title VII race discrimination case with material disputed facts.

ARGUMENT

IT WAS REVERSIBLE ERROR TO GRANT A SUMMARY JUDGMENT AND DISMISSAL OF PETITIONERS RACE DISCRIMINATION AND DUE PROCESS CASE

The District Court erred when it granted Respondent's Motion to Dismiss or, in the Alternative, for Summary Judgment The Fourth Circuit's affirmance was error. This Court should reverse and remand with instructions to place Petitioner's case back on the trial docket.

Summary judgment only is proper when there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. Rule 56 (c), Federal Rules of Civil Procedure. See also Ballinger v. North Carolina Agricultural Extension Service, 815 F. 2d 1001, (4th Cir.) cert. denied, 108 S. Ct. 232 (1987). Summary judgment was not proper in the District Court because the material facts were in dispute.

AS TO COUNTS I AND II

Petitioner has the initial burden of proving a *prima facie* case of race discrimination. Once this is established, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for the adverse action. If this burden is met, then Petitioner has the

burden of showing that the stated reason is a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In meeting his *prima facie* burden, Petitioner must show that he is a member of a protected class and that although he was meeting Respondent's expectations, he was terminated without cause or singled out while similarly situated individuals not in his protected class were not terminated. *Flowers v. Crouch-Walker Corp*, 552 F.2d 1277, 1282-1283 (7th Cir. 1977).

Petitioner meets his burden of proof in Counts I and II of the Complaint. He is Black and thus a member of a protected class. He was so qualified for his position that Respondent's personnel in Panama hired Petitioner without a personal interview.

Part of the enticement by Respondent was that Petitioner would receive a promotion after six months to an NM-12. Almost immediately subsequent to Appellant's arrival in Panama, Respondent began discriminating against Petitioner.

K. C. Purdy exclaimed disgust and disapproval in that Petitioner was Black. This was followed by a telephone call by Cornelia Ceddy "warning" Petitioner's employees that their supervisor was Black.

Then, Respondent had two women falsify a sexual harassment complaint against Petitioner. Finally, the women acknowledged that the complaint was false but they were put up to it by Petitioner's higher-ups because Respondent was not pleased that Petitioner was Black.

Finally, K. C. Purdy invited Petitioner to Christmas dinner at Purdy's quarters, but told Petitioner he would have to bring his own chair. Petitioner presumed there to be a shortage of chairs and arrived carrying his own chair. Upon entering the quarters, not only did Petitioner notice that he was the only Black and that there was an abundance of empty matching chairs, but he was subjected to Purdy and his other guests laughing at Petitioner.

These events show that Respondent discriminated against Petitioner on the basis of race. After six months in Panama, Petitioner had received commendations for his work, taught computer courses and nobody had a complaint about his job performance. The only explanation for his not receiving the promised promotion after six months to the NM-12 level was that he was

Black. Accordingly, summary judgment is not proper on Count I.

Respondent states what it feels is a legitimate non-discriminatory reason for Petitioner's termination, that being an alleged travel voucher fraud. First, Petitioner asserts that Respondent has failed to establish that a travel voucher fraud took place.

In its memorandum in support of its position, Respondent submits "Information Tending to Establish That Plaintiff Knew the Course was Canceled Before Leaving Panama." In this section, Respondent relies on Ms. Carol Wagenheim who states that she spoke with somebody in Panama who identified himself as George Foxx, and that she explained that the course was canceled. Petitioner does not dispute that Ms. Wagenheim spoke with somebody in Panama. However, Respondent has no proof that Petitioner actually received the call and Petitioner has sworn under oath that he never received the call.

Next, Respondent presents, "Information Tending to Establish that Plaintiff's Travel Voucher Contains Other Fraudulent Information." In this section, Respondent cites the difference in the Court of Flags Hotel and the Days Inn Hotel ($27.90) reflected on the travel voucher.

Petitioner explained and testified at the MSPB hearing that Ms. Culmer had him put Court of Flags rather than Days Inn because Court of Flags was a pre-authorized hotel and they needed to facilitate the claim. Respondent has no proof that Petitioner intentionally misrepresented a fact in order to cheat Defendant out of $27.90.

Finally, Respondent presents, "Information Tending to Establish That Plaintiff Misrepresented His Dealings With Alamo Rent-A-Car In His N/S Affidavit of May 14, 1990." Subsequent to learning that the course in Orlando was canceled and his government business essentially was over, Petitioner contacted Alamo Rent-A-Car to return the vehicle and check on the cost of renting a vehicle for personal use for the week. He was informed by somebody whom he believed to be named Cathy that he had had the car long enough already and was going to be charged for the week. So, he kept the car and used it for personal use. He submitted the bill to Respondent because Respondent was going to be charged for the week anyhow.

An Alamo employee testified that Alamo's policy was to credit

customers for early return of vehicles. However, Respondent is unable to show that Petitioner was not told about the rental rates in the manner in which Petitioner has testified.

Petitioner has adequately explained the minor discrepancies in his trip and his travel voucher. Certainly, there is no proof of any intentional misrepresentation on the part of Petitioner. Petitioner asserts that Respondent has failed to meet its burden of proving a legitimate non-discriminatory reason for Petitioner's termination; Respondent has failed to prove a travel voucher fraud.

However, if this Court feels that Respondent has shown a travel voucher fraud, then the penalty of termination was a pretext for discrimination. The Affidavit of Elsie Mills establishes that Harvey Von Hollen was a similarly situated Caucasian male convicted of a travel voucher fraud. Mr. Von Hollen received a reprimand to be placed in his file for two years.

Petitioner attempts to challenge Ms. Mills affidavit with the purported declaration of Mr. Von Hollen. Petitioner moved to strike the declaration because it was undated, unnotarized, not based on personal knowledge and because Mr. Von Hollen was not a witness listed for trial by Respondent.

Respondent argued that the declaration was proper under 28 U.S.C. §1746, and the District Court must have agreed because it used Mr. Von Hollen's declaration to support its conclusion that Petitioner failed to show pretext. This was error.

Title 28, U.S.C. §1746 states that a declaration may be used if the declarant subscribes that the declaration "as true under penalty of perjury, and dated, in substantially the following form: (2) . . . 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).'" 28 U.S.C. §1746.

Mr. Von Hollen's declaration does not comport with 28 U.S.C. §1746 nor Rule 56, Federal Rules of Civil Procedure, and it should have been stricken. The declaration says, "I, HARVEY VON HOLLEN, hereby affirm under penalty of perjury that the following facts are true and accurate to the best of my knowledge and belief." There is a signature at the end of the declaration, and it is undated.

Petitioner asserts that affirming that the facts are "true and accu-

rate to the best of my knowledge an belief" does not comport with 28 U.S.C. §1746. Additionally, the declaration is undated.

Moreover, even if it was a proper declaration, it should have been stricken under Rule 56(e), Federal Rules of Civil Procedure. Rule 56(e) states, in part that "affidavits... shall set forth such facts as would be admissible in evidence..."

Mr. Von Hollen was never listed as a witness in the case below. Accordingly, he would not have testified at trial, and thus his declaration is not facts that would have been admissible in evidence.

The District Court erred by relying upon Mr. Von Hollen's declaration instead of striking it, and the District Court erred in granting summary judgment.

The Fourth Circuit erred as well. As to Count I, it affirmed but stated that Petitioner failed to show that a position remained available by promotion to equally qualified persons after Petitioner's application was rejected.

This is a misapplication of the law to the facts of this case. In this case, Petitioner's claim of denial of promotion is not based upon apply for, and being rejected from, a promotion.

Petitioner's claim is based upon the fact that he was told if he accepted that job in Panama after six months he would receive a promotion. It was a promised promotion, not a vacancy for which he was rejected.

Instead he received blatant racial hostilities, no promotion, and ultimately, termination.

As to Count II, the Fourth Circuit adopted the reasoning of the District Court, opposition of which is argued by Petitioner above.

The material facts are in dispute, and this Court should reverse and remand with instructions to place Petitioner's case back on the trial docket.

AS TO COUNT III

Petitioner asserts that he was terminated without the due process rights accorded in 5 U.S.C.§4303. Respondent asserts that Petitioner was not removed for unacceptable performance under 5 U.S.C. §4303, but instead, "for such cause as will promote the efficiency of the service," under 5 U.S.C. §7513. In either event, Complainant was entitled to the due process protection of 30 days

advance written notice of the removal that was being proposed.

The May 17, 1990 Notice of Proposed Removal tells Petitioner the removal was proposed for not less than 30 days from the date of the letter, and that he had 7 days to respond, not 8 as asserted in Respondent's memorandum. Four days later, Petitioner's job was terminated.

Additionally:

> A public employee facing discharge is entitled to the safeguards of procedural due process only if he can demonstrate that the implicates a property or liberty interest protected by the Due Process Clause; if a property or liberty interest is not implicated, "he must settle for whatever procedures are provided by statute or regulation." (Citation omitted).

Sipes v. United States, 744 F.2d 1418, 1420 (10th Cir. 1984). Title 5 vested Petitioner with due process rights and property interest in his job. Accordingly, it was a violation of Title 5 and the Due Process Clause to terminate Petitioner's employment just 4 days subsequent to giving him the Notice of Proposed Removal.

The District Court ruled that Petitioner failed to raise the issue of procedural error in the MSPB and EEOC and therefore it was foreclosing the issue from consideration.

Petitioner asserts that he challenged his removal and Respondent's method of removal at the MSPB and EEOC. At those levels, the procedural issue was a sub-issue of the larger issue of racial discrimination. Because Petitioner failed to delineate the procedural issue from the racial issue, it should not foreclose him from raising them as separate issues at this level.

The Fourth Circuit ruled that the Civil Service Reform Act provides an adequate remedy. Petitioner asserts that the Civil Service Reform Act does not provide an adequate remedy and that the Due Process Clause of the Fifth Amendment to the United States Constitution is the remedy in the case.

Accordingly, this Court should reverse and remand the dismissal of Count III.

This race discrimination case with disputed facts was not ripe

for summary judgment. Additionally, the Due Process Clause prohibits taking Petitioner's job without the mandated procedural due process protection.

Therefore, this Court should grant the writ and ultimately reverse and remand with instructions to place this case back on the trial docket.

Respectfully submitted,

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H. LAWRENCE GARRETT, III,
Secretary, Department of the Navy,

Respondent.

APPENDIX PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION

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APPENDIX

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OPINION OF THE FOURTH CIRCUIT A1

DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.....A5

42 U.S.C. §2000e-5.....A5

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GEORGE J. FOXX,
Plaintiff-Appellant,

v.

H. LAWRENCE GARRETT, III
Secretary, Department of the Navy,
Defendant-Appliee.

} No. 92-2276

Appeal from the United States District court
for the eastern District of Virginia, at Alexandria.
James C. Cacheris, District Judge.
(CA-92-297)

Argued: July 12, 1993

Decided: September 1, 1993

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Howard Jay Shifke, Tampa, Florida, for Appellant. Richard Parker, Assistant United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF**: Lisa D. Sinrod, Alexandria, Virginia, for Appellant. Kenneth E. Melson, United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

George J. Foxx appeals an order granting the Secretary of the Navy's alternative motion to dismiss/motion for summary judgment on Foxx's three-count action for alleged violations of 42 U.S.C.§ 2000e-16 (Title VIII) and his due process rights as secured by 5 U.S.C. § 4303 and the Fifth Amendment. Reviewing the district court's decision de novo with respect to both the summary judgment on Courts I and II, *Jackson v. Kimel*, 992F.2d 1318, 1322 (4th Cir. 1993), and the Rule 12(b)(6) dismissal of Count III, *Schatz v. Rosenberg*, 943 F.2d 485,489 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1475 (1992), we affirm.

Foxx is a black Vietnam-era Navy veteran who had worked for the U.S. Civil Service for over thirteen years when, in 1989, he was offered a management-level position at a Naval station in Panama. He alleged that the offer came by telephone from one Lt. Cdr. K.C. Purdy and that it was accompanied by a promise of a promotion after six months' service. Foxx accepted the offer and worked the Panama job for approximately nine months.

During that time he allegedly suffered racial discrimination at the hands of Navy personnel. He claimed that this mistreatment culminated when the Navy not only failed to promote him as promised but instead fired him, allegedly for falsifying a travel voucher. Although Foxx received a notice of intent to discharge stating that no final action would occur for 30 days, his appointment was revoked and he was removed from federal service just eight days later. J.A. 13, 16, 132.

On Foxx's request for reconsideration, Commander R. A. Kelly affirmed his decision to discharge. That decision was upheld on serial appeals to an Administrative Law Judge of the Merit Systems Protection Board and to the Equal Opportunity Commission's Office of Review and Appeals, both expressly rejected Foxx's contention that his discharge was motivated by discriminatory animus, and fund that he had filed the travel voucher with fraudulent intent. J. A. 103, 137.

Instead of appealing that final administrative decision in federal court as was his right, 5 U.S.C. § 7703(b)(2), Foxx brought the instant, independent action and sought a jury trial on each of his three claims. *See id.* § 7702(e); H.R. Rep. No 1717, 95th Cong., 2d Sess. 141 (1978) (conference report), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2874 ("[t]he conference substitute fully protects the existing rights of employees to trial de novo under title [sic] VII of the Civil Rights Act of 1964"). Counts I and II allege violations of due process rights secured by 5 U.S.C. § 4303 and the Fifth Amendment in the failure to afford Foxx proper preterminati-no notice of, and opportunity to respond to, the charges against him.

After studying the briefs and the summary judgment record and hearing oral argument, we affirm the judgment on the reasoning of the district court, *Foxx v. Garrett*, No. 92-297-A (E.D. Va Sept. 9, 1992) (memorandum opinion), with the following modifications. With respect to the failure-to-promote claim in Count I, our review of the record shows that Foxx failed to raise a genuine issue of fact regarding a key element of his prima facie case. *Wright v. National Archives & Record Service*, 609 F.2d 702, 714 (4th Cir. 1979) (requiring proof that position *remained available* by promotion to equally qualified persons after complainant's application is rejected). Consequently, there was no need to consider the Navy's defense to that claim—*i.e.*, its contention that the falsified voucher was a legitimate, nondiscriminatory reason for denying a promotion that was allegedly due several months prior to the voucher's filing. *See Foxx*, mem. op. at 8 (dismissing Count I on that basis).

With respect to Count III, the court reasoned that Foxx's failure to raise the procedural issues "below" barred their consideration pursuant to his separate and distinct due process claim. *Id.* at 9. In support, the court cited cases involving direct appeals of MSRB decisions rather than actions such as Foxx's brought subsequent to, but independently of the administrative process. *Id.* (citing *Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1130 (Fed. Cir. 1986); *Meglio v. Merit Systems Protection Bd.*, 758 F2d 1576, 1577 (Fed. Cir. 19845). We affirm the dismissal of Count III on the alternative ground that the Civil Service Reform Act provides an adequate remedy for the conduct complained of. *Bush v.*

Lucas, 462 U.S 367 (1983); *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

AFFIRMED

Due Process Clause, Fifth Amendment, United States Constitution

No person shall be deprived on life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. §2000e-5(f)(3)

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such and actin may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the actin might have been brought.